EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN C. GRANT,

Defendant-Appellant.

UNPUBLISHED
October 6, 2009

No. 284100
Macomb Circuit Court
LC No. 2007-002480-FC

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317.[1] He was sentenced to 50 to 80 years' imprisonment. Because the trial court did not err in denying defendant's motions for change of venue and to suppress his custodial statements to police, or in requiring defendant to repay court-appointed counsel costs without conducting an ability-to-pay analysis, and because the trial court articulated substantial and compelling reasons for the extent of the upward departure of defendant's minimum sentence from the sentencing guidelines' range, we affirm.

Defendant was charged with and convicted of the murder of his wife, Tara Grant. Defendant and Tara were involved in an argument in early February 2007 at their Macomb County home. Apparently, the couple's argument escalated to the point where it became physical and defendant strangled Tara causing her death. Defendant then took her body to his place of employment and dismembered her. Defendant scattered Tara's body parts throughout a public park near the couple's home, and hid her torso in a large plastic container in the family's garage. Defendant reported Tara missing several days later.

Several weeks later, police executed search warrants at defendant's home and business, and discovered a portion of Tara's body in the couple's garage. By then, defendant had fled the area in a borrowed vehicle. A search conducted by various law enforcement agencies resulted in the apprehension of defendant at a remote park in northern Michigan. At the time of his arrest,

[1] Prior to trial, defendant pled guilty to one count of disinterment or mutilation of a dead body contrary to MCL 750.160. He was sentenced to six to ten years' imprisonment on this conviction. Defendant raises no issues on appeal concerning this conviction or sentence.

defendant had been wandering through the park for several hours and suffered from mild frostbite and hypothermia. Defendant was immediately transported to a local hospital where he fully recovered within two days. During his stay in the hospital, defendant confessed the details of the crime to police. Defendant was charged with first-degree murder.

On appeal, defendant first contends that, given the vast amount of pretrial publicity his case generated, particularly in Macomb County, the trial court's denial of his motion for change of venue deprived him of his right to an impartial jury, due process of law, and a fair trial. We disagree.

We review the denial of a motion for a change of venue for an abuse of discretion. *People v Jendrzejewski,* 455 Mich 495, 500; 566 NW2d 530 (1997). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006).

Generally, a defendant must be tried in the county where the crime was committed. MCL 600.8312. The trial court may change venue to another county in special circumstances, where justice demands or where our statute so provides. MCL 762.7.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008), quoting *Irvin v Dowd,* 366 US 717, 722, 81 S Ct 1639, 6 L Ed 2d 751 (1961). To that end, it may be appropriate, for example, to change the venue of a criminal trial when "widespread media coverage and community interest have led to actual prejudice against the defendant." *People v Unger, supra,* at 254.

"Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzejewski, supra* at 500-501. In determining whether a defendant has been deprived of a fair trial by virtue of pretrial publicity, the reviewing court must consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id.* at 501-502. The court must also distinguish between largely factual publicity and that which was invidious or inflammatory. *Id.* at 504.

Before delving into defendant's argument, we first address the prosecution's assertion that defendant waived any claim of error with respect to the jury because he expressed satisfaction with the jury impaneled. Defense counsel did, in fact, express satisfaction with the jury as impaneled. Generally, an expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter impaneled and sworn. *People v Hubbard*, 217 Mich App 459, 466; 552 NW2d 493 (1996). However, in *Leslie v Allen-Bradley Co, Inc,* 203 Mich App 490, 493; 513 NW2d 179 (1994), this Court concluded that an expression of satisfaction with the jury on the record, in the jury's presence, did not constitute a waiver where the complete record demonstrated that the party was not satisfied with the jury and where the party's expression of satisfaction was "a necessary part of trial strategy, designed to avoid alienating prospective jurors."

In the present matter, defense counsel on several occasions indicated dissatisfaction with having to select a jury from Macomb County residents, given the unprecedented amount of publicity the case had received. He moved for a change of venue prior to the start of trial and again during jury selection. As in *Leslie, supra*, there is nothing in the trial court record to support a conclusion that defendant's expression of satisfaction with the jury "was intended as a relinquishment of his belief that the venire was selected in an unconstitutional manner or that such expression was anything more than an exercise in practicality, given the trial court's earlier adverse ruling and the potential for jury alienation." We are satisfied that defendant did not waive his challenge by expressing satisfaction with the jury as impaneled.

Addressing defendant's claim of error, we note that this case, as claimed by defendant, received an unprecedented amount of pretrial publicity. There were in excess of fifty written news articles concerning the crime published between February 2007 and the December 2007 trial, with a large number of the articles appearing on the front page of local newspapers. Specific details of the case were regularly broadcast on television, including video testimony from defendant's preliminary examination. Both the Macomb County Sheriff and the Macomb County Prosecutor regularly appeared on television and news radio programs, providing a significant amount of very specific information to the public concerning the case and the impending trial. There was, indisputably, no information spared from public exposure throughout the entire course of this case. While the numerous press-conferences held and the release to the media of police reports and other documents containing details of the case by the prosecution and the Sheriff's Department appear unprecedented, we cannot find that either pretrial publicity or statistical analysis supports defendant's claim that he was denied a fair trial under *People v Jendrzejewski, supra.*

In determining whether a change of venue was required due to pretrial publicity, the reviewing court should consider the "quality and quantum of pretrial publicity," and then it must "closely examine the entire voir dire to determine if an impartial jury was impaneled." *Jendrzejewski, supra* at 517. When we consider the quality and quantum of the pretrial publicity in the instant matter, while the media coverage of this case was extensive, the coverage provided was primarily factual, detailing the status of the case, testimony elicited during preliminary examination, and other facts that were later admitted as evidence at the trial. The tone and content of the reports could certainly have been perceived as inflammatory--but that was essentially due to the nature of the crime. There may have been no neutral way to report on this case. Moreover, "[c]onsideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue." We must also consider the entire voir dire. *Jendrzejewski, supra* at 517.

Our Supreme Court has suggested three possible approaches to voir dire to avoid the danger of prejudice from pretrial publicity: "1) questionnaires prepared by the parties and approved by the court, 2) participation of attorneys in the voir dire, and 3) sequestered questioning of each potential juror." *Jendrzejewski, supra* at 509. The trial court in the instant matter employed all three methods.

The initial jury pool numbered over 350. The potential jurors were all required to complete a probing 25-page questionnaire employed to determine their knowledge of the case and whether they had formed any opinions concerning defendant's guilt or innocence. Approximately 50 potential jurors were excused for cause (by stipulation of the parties) based

solely upon their questionnaire answers. The prosecution and defendant (and occasionally, the court) then questioned the remaining potential jurors, outside the presence of other potential jurors, over a seven-day period. Over 100 individuals were then excused due to their expressions of potential bias, while others were excused for various reasons unrelated to their knowledge and/or opinions concerning the case. The remaining pool of potential jurors was then subjected to group questioning, on the record. During this second round of questioning, several additional potential jurors were excused for cause and both sides utilized peremptory challenges. The pool continued to narrow until both the prosecution and the defense expressed satisfaction with the jury. Sixteen jurors were administered an oath and heard the evidence.

There was no impediment to discovery of actual or potential biases, and the voir dire was sufficiently probing to uncover any biases. While essentially all of the jurors indicated being aware of the case, the vast majority of those impaneled had only a passing knowledge of the case and had little exposure to the details. In addition, all those impaneled swore, under oath, that they could be impartial, notwithstanding any exposure to media reports about the case. "Where potential jurors can swear that they will put aside preexisting knowledge and opinions about the case, neither will be a ground for reversing a denial of a motion for a change of venue." *People v DeLisle,* 202 Mich App 658, 662; 509 NW2d 885 (1993). Indeed, "[t]he value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." *Jendrzejewski, supra* at 519. Given that the impaneled jurors knew little about the case and swore they would be impartial, despite the pervasive media coverage, defendant has not demonstrated that the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Jendrzejewski, supra* at 501.

This conclusion does not change, even with the relatively high percentage of the potential jurors in this matter acknowledging personal biases against defendant, based upon the information they had concerning the case. As previously indicated, community bias has been implied, albeit rarely, from a high percentage of the venire who admit to a disqualifying prejudice. *Jendrzejewski, supra* at 500-501. In *Irvin v Dowd*, 366 US 717, 727; 81 S Ct 1639, 1645 (1961), for example, 90% of the potential jurors examined entertained some opinion as to the defendant's guilt. The Supreme Court found that:

> the 'pattern of deep and bitter prejudice' shown to be present throughout the community was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.

Here, in contrast, slightly less than 50% of potential jurors were excused due to preexisting notions as to defendant's guilt. More importantly, of the actual jurors seated, the vast majority had only a passing knowledge of the case and only one juror initially expressed a preconceived notion regarding defendant's guilt.

While there is no specific rule detailing what percentage of potential jurors must be excused for cause before the scale tips toward a demonstrated pattern of deep and bitter prejudice present throughout the community, this case appears to be similar to *People v DeLisle*, 202 Mich App 658; 509 NW2d 885 (1993). In *DeLisle,* 31% of the jury venire (21 out of 68) was excused

because of bias, and all of the 14 seated jurors admitted having heard the general facts of the case, with five having heard of the defendant's confession, and one having heard of a purported prior attempt by the defendant to murder his family. *Id.* at 667-668. The *DeLisle* Court concluded that "the number of jurors excused for bias during voir dire was not sufficiently high to presume that the jurors chosen were part of a community deeply hostile to defendant." This was true even though the case (where a father deliberately drove the family vehicle into a lake, killing his four children and attempting to kill his wife) received substantial media attention and where the media attention was found to be inflammatory.

While almost 50% of the potential jurors in this case were excused due to preconceived notions regarding defendant's guilt, the fact remains that these jurors were excused and jury selection continued with a careful and studied questioning of the remaining jurors. Again, of the actual jurors seated, the vast majority had only a passing knowledge of the case and only one juror initially expressed (and then swore she could set aside) a preconceived notion regarding defendant's guilt.

As was the case in *DeLisle, supra*, we find no showing of the kind of improper proceedings that may sometimes lead to automatic reversal. The careful and exhaustive voir dire procedures employed by the trial court demonstrated that the jurors chosen, although familiar with the case, were not biased against defendant.

A consideration in our analysis and ultimate conclusion that defendant's due process rights were not violated by the trial court's denial of his motion for a change of venue is the nature of the defense. Defendant never claimed to be innocent. He pled guilty to the mutilation of a corpse just after the jury was impaneled and, in opening statements, defense counsel affirmatively stated:

> First of all, simply said, Mr. Grant killed his wife. He did. That killing occurred on February 9, 2007. Your job is to determine what happened. What degree or lesser charge of a homicide occurred that day. What happened? Was it premeditated? We think the evidence will show that it is not a premeditated murder.

We question where the harm in allowing the trial to proceed in Macomb County can be found. The defense claim was that the killing was not premeditated—there was no claim that defendant did not kill his wife. Arguably, a fair trial would end in the result defendant sought and ultimately obtained--a homicide conviction that did not involve premeditation.[2]

Under the totality of the circumstances, defendant's trial was fundamentally fair and decided by a panel of impartial jurors.

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[2] Defendant argues that the result actually sought was a voluntary manslaughter conviction, MCL 750.321. The trial court instructed the jury on the charged offense, second- degree murder and voluntary manslaughter.

Defendant next contends that the trial court erred in denying his motion to suppress his custodial statements made to police, given that the police violated an agreement with his defense counsel to contact counsel as soon as defendant was arrested, and to not speak to defendant without counsel present. According to defendant, because the agreement was violated, the purported waiver of his right to counsel at the custodial interrogation was invalid. We disagree.

A trial court's ultimate decision on a motion to suppress evidence is reviewed by this Court de novo. *People v Dunbar* (After Remand), 264 Mich App 240, 243; 690 NW2d 476 (2004). The trial court's findings of fact in a suppression hearing are reviewed for clear error. *Id.* "A finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake had been made." *People v Wilkens,* 267 Mich App 728, 732; 705 NW2d 728 (2005), quoting *People v Frohriep,* 247 Mich App 692, 702; 637 NW2d 562 (2001).

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. Defendant concedes that he had no Sixth Amendment right to counsel on March 4, 2007, the date he confessed to police, as he had not yet appeared in court for any judicial proceeding. He instead asserts a Fifth Amendment right, and a right to counsel under the Michigan Constitution, during his custodial interrogation.

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard,* 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Custodial interrogation involves "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v Arizona, supra,* at 444. There is no dispute that defendant was in custody at the time he made the now-challenged statements to police.

Whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152, 158-159 (2000). Determining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior. *Id.* However, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him. *Id.*

The evidence at the *Walker*[3] hearing established that when defendant was apprehended he was transported to the hospital where he was placed in custody. After receiving medical attention, when defendant was asked if he wanted to speak to the police, defendant stated that he first wished to speak to his attorney, Mr. Griem. Defendant had retained Mr. Griem shortly after his wife's disappearance. Mr. Griem had many contacts with the Macomb County Sheriff's Department during the investigation into Tara Grant's reported disappearance. During several of

[3] *People v Walker,* 374 Mich 331; 132 NW2d 87 (1965).

these contacts, representatives of the department agreed that all contact with defendant would be directed through his counsel, to advise counsel if defendant was apprehended, and to not question defendant. Several officers affirmatively acknowledged at the *Walker* hearing that this agreement was in place. Despite the agreement, it is undisputed that Mr. Griem was not immediately notified when defendant was apprehended at approximately 6:30 a.m. on March 4, 2007. Mr. Griem, unaware that defendant had been located and was in custody, terminated his representation of defendant via a live news broadcast several hours later.

When he asked to speak to Mr. Griem, the Macomb County Sheriff's Department advised defendant that Mr. Griem had terminated their attorney-client relationship on television that morning. Defendant was then asked if he wanted to look for a local attorney. He declined the offer. Defendant indicated that he wanted to speak with the officer in charge of the case. Defendant then advised the officer in charge, by telephone, that he wished to speak to him about the matter. When the officer arrived at the hospital several hours later, defendant waived his *Miranda* rights and made a verbal and written confession.

Defendant admittedly can provide no authority to suggest that where an agreement not to speak to a suspect is in place between police and defense counsel, the agreement survives counsel's resignation or that a purported violation of the agreement requires the suppression of any statement made in contravention of the agreement. Defendant nevertheless claims that the department's failure to advise Mr. Griem of defendant's apprehension interfered with the attorney-client relationship in the same manner as the refusal to notify a defendant of the availability of his counsel as in *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996). In *Bender*, two defendants were arrested for several counts of breaking and entering. Apparently, simultaneous with the first defendant's arrest, defendant's mother retained the services of a lawyer to represent him, but was not permitted access to her son to pass along retained counsel's message that defendant was not to talk to anyone until he first spoke with counsel. Similarly, following the second defendant's arrest, his family retained counsel. The retained counsel called the police station to speak with her client and was denied contact. Without informing either defendant that they had retained counsel or of counsel's attempted contact, officers questioned both defendants. Each defendant affirmatively waived his Miranda rights and thereafter gave full confessions. Our Supreme Court, recognizing that the police failed to inform defendants that they had retained counsel and that each counsel wished to speak with their clients before a statement was made, held that, on the basis of Const. 1963, art. 1, § 17, defendants did not make knowing and intelligent waivers of their right to remain silent and their right to counsel. *Id.* at 614.

The instant matter differs in that defendant did not have retained or appointed counsel at the time of his confession. His retained counsel had publicly and unequivocally terminated their attorney-client relationship. Defendant was afforded the opportunity to secure new counsel, before making a statement, and declined. Furthermore, there is no indication that the Sheriff's Department's failure to immediately advise Mr. Griem of defendant's capture was a deliberate attempt to interfere with the attorney-client relationship.

There was a relatively short period of time between defendant's capture (6:30 a.m.) and Mr. Griem's public announcement of his resignation (approximately 9:00 a.m.). Moreover, there is no indication that the police anticipated or had knowledge of the impending resignation at the time defendant was apprehended, or that they were deliberately withholding information

regarding defendant's capture in hopes that counsel would resign. Notably, at the time of Mr. Griem's resignation, no one from the Sheriff's Department had spoken to defendant or attempted to question him. It was not until that afternoon, following the resignation, that defendant indicated he wished to speak to Mr. Griem, and many hours later that officers actually questioned defendant. There is also no indication that defendant was precluded from attempting to contact Mr. Griem on his own.

Given Mr. Griem's public, unequivocal statements, it was reasonable to conclude that the police no longer had to advise or consult with him before speaking with defendant. When they were able to speak to defendant, several hours after his apprehension, the police accurately advised defendant that his retained counsel had resigned. Again, the officers offered defendant the option of retaining substitute counsel, which he declined. Defendant, having previously retained counsel, clearly understood the importance of obtaining legal advice. The fact that he declined to obtain substitute counsel, and then spoke to police, suggests that he did so with full knowledge of the right he was waiving.

Finally, when advised that Mr. Griem had resigned, defendant himself initiated contact with the officer in charge. The undisputed testimony at the *Walker* hearing indicates that defendant attempted to speak to two different Macomb County Sheriff's Deputies and a nurse about his circumstances. All terminated any discussion. The deputies advised defendant that if he wanted to speak to anyone about the case he should speak to the officer in charge. Defendant was given a telephone and spoke to the officer in charge. Defendant asked the officer to come to the hospital so he could make a statement. The officer drove four hours to reach the hospital. Only after Mirandizing defendant did the questioning begin. As stated in *Edwards v Arizona*, 451 US 477, 484-485 101 S Ct 1880, 1885 (US Ariz, 1981), "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*" (emphasis added). There was no clear error in the trial court's determination that defendant's confession was freely and voluntarily given, and that the statements were not subject to suppression.

Defendant contends that had Mr. Griem been immediately advised of defendant's apprehension, it is likely that Mr. Griem would have spoken to defendant, and defendant would not have waived his right to counsel. This contention is pure speculation. Mr. Griem testified at the *Walker* hearing that although he had advised defendant not speak to the media or to law enforcement, defendant did, nevertheless, speak to the media and to law enforcement officials while Mr. Griem actively served as defendant's retained counsel. Mr. Griem also testified that he had made his decision to withdraw as defendant's counsel on Friday, March 2, 2007, but had been unable to discuss the decision with defendant. Mr. Griem stated that his intention in making the public announcement was to let defendant know he was no longer representing him. He testified that he knew at the time he made his public statement that the police were looking for defendant and that defendant would be taken into custody if found. Mr. Griem did not testify that he would have continued on as defendant's retained counsel if he had been advised of defendant's apprehension prior to his media statement.

Defendant also contends that his statement should have been suppressed because of alleged ethical violations by the prosecution in advising the police that they could speak with defendant without notice to Mr. Griem, and due to Mr. Griem's alleged improper action of

withdrawing from representation through the media. Acknowledging that the remedy for the commission of ethical violations is generally disciplinary actions against the attorneys rather than suppression of a statement, defendant encourages this Court to follow at least one other jurisdiction's holding that where the ethical violation is egregious, suppression in a possible remedy. We decline to do so.

As was observed in *People v Green*, 405 Mich 273, 293-294; 274 NW2d 448 (1979):

> The provisions of the code [of professional responsibility] are not constitutional or statutory rights guaranteed to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar. Although it is true that the principal purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary action against the offending attorney.
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> The admissibility of evidence in a court of law, on the other hand, is normally determined by reference to relevant constitutional and statutory provisions, applicable court rules and pertinent common-law doctrines. Codes of professional conduct play no part in such decisions.

Even if we were to accept defendant's contention that a prosecutor's and/or Mr. Griem's conduct constituted an ethical violation, the remedy would be an attorney disciplinary action — not suppression of defendant's confession.

Defendant next argues that the trial court failed to articulate a substantial and compelling rationale for the extent of the upward departure of his minimum sentence from the sentencing guidelines' range, and that resentencing is required. We disagree.

A trial court must impose a minimum sentence within the sentencing guidelines' range unless a departure from the guidelines is permitted. MCL 769.34(2). The sentencing court may only depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and it states the reason on the record. MCL 769.34(3); *People v Abramski,* 257 Mich App 71, 74; 665 NW2d 501 (2003). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b). Additionally, the trial court's reasons for departing from the guidelines must be objective and verifiable. *People v Abramski, supra.* "They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith,* 482 Mich 292, 299; 754 NW2d 284 (2008).

A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Babcock,* 469 Mich 247, 268-269; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *Id.* The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error, *Id.* at 264, and the conclusion of whether a reason is objective and verifiable is reviewed de novo. *Id.*

It is agreed that the appropriately scored guidelines for defendant's second-degree murder conviction resulted in a recommended minimum sentence range of 225 to 375 months or life. The trial court significantly departed upward from this guideline range, sentencing defendant to a term of 600 to 900 months imprisonment on the conviction. In departing from the guidelines, the trial court engaged in an extraordinarily detailed and thorough analysis, making it abundantly clear that it based the specific upward departure on the failure of the sentencing guidelines to fully consider the severity and permanence of the victim's children's and other family members' psychological injuries, and the intense, proactive actions undertaken by defendant to avoid detection and arrest. Both of the above considerations were based upon readily verifiable facts, were clearly supported, and represented substantial and compelling reasons for departure. Defendant does not really assert otherwise, but instead relies almost exclusively on *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008) to support his position that the trial court failed to articulate why his particular sentence was *proportionate* to this specific offense and offender.

Smith involved the digital penetration of a nine year-old female by a man she looked to as a quasi-father figure. The adult male was charged with three counts of criminal sexual conduct. The defendant's recommended minimum sentence range under the sentencing guidelines was 9 to 15 years' imprisonment. The trial court, however, sentenced the defendant to three concurrent terms of 30 to 50 years' imprisonment. The Supreme Court found that the trial court adequately articulated substantial and compelling reasons for an upward departure, but noting that the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made, addressed whether the "off the charts" minimum was adequately explained:

> . . . if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. . . Hence, to complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of necessity, engage in a proportionality review. . .

The *Smith* court noted that one potential means of offering such a justification is to place the specific facts of a defendant's crimes in the appropriate sentencing grid. While defendant states that his guidelines score of 110 OV points does not reflect that this was the most outrageous or heinous example of second degree murder that can be imagined, we are hard pressed to think of more disturbing circumstances. Defendant scored in the highest level for purposes of OV scoring. Moreover, while the *Smith* court did suggest that a proportionality analysis might be undertaken by looking to the sentencing grid, it also affirmatively stated that a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid. *Id.* at 309.

As acknowledged in *Smith, supra* at 310, there are no precise words necessary for a trial court to justify a particular departure. In the instant matter, the trial court specifically acknowledged that an upward departure must be proportionate to the defendant and his offenses.

The trial court also specifically stated at the end of her departure analysis, "For all of the foregoing reasons the Court is satisfied that the upward departure in this case is more proportionate to the Defendant's demonic, manipulative, barbaric, and dishonest actions in this case, and the seriousness of his offense than the sentencing guideline range would otherwise require." The "foregoing reasons" were the trial court's analysis concerning the severity and permanence of the victim's children's and other family members' psychological injuries and the intense, proactive actions undertaken by defendant to avoid detection and arrest.

In terms of the psychological injury to the children, the court considered a letter submitted by the children's therapist indicating that the children suffered significant emotional harm as a result of the crime. Letters and statements from Tara Grant's sister and brother-in-law, who took care of the children after her disappearance, made it clear that the children may have witnessed part of the crime, were now afraid of their father, and were immensely traumatized by the murder. Not only were the children forced to move out of state to start a new life surrounded by strangers, the pervasive and unrelenting media attention this case garnered created a detailed, permanent record of the crime, ensuring that the children may at some point know every graphic and lurid detail of their mother's murder and dismemberment. It is also a simple matter of common sense that children whose mother was brutally murdered and mutilated by their father, having effectively lost both parents, would be psychologically damaged in a way and to such an extent that is almost incomprehensible. We find no error in the trial court's determination that the available offense variable points inadequately measured the psychological injury to the Grant children.

With respect to defendant's efforts to conceal the murder, the evidence established that defendant methodically and precisely dismembered Tara Grant's body and distributed the parts in a public park. Defendant then attempted to mislead police by filing a missing person's report, making calls to the victim's cell phone after her death, and appearing in the media tearfully begging for his wife's return. Finally, the defendant's actions immediately before his capture resulted in the search efforts of multi-jurisdictional law enforcement departments, his hospitalization and his medical treatment.

Unlike the *Smith* case, the connection between the reasons given for departure and the extent of the departure in this matter is clear. The trial court's meticulous analysis of the facts and the circumstances that she found to justify an upward departure clearly justify the *specific* departure. Given the totality of the facts and circumstances, we find the sentence proportionate to the offense and the offender.

Defendant lastly argues that where the trial judge failed to take into account his ability to repay the costs of his appointed trial counsel, the matter should be remanded to the trial court for consideration of his present and future ability to pay that cost. We disagree.

Defendant relies upon *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004) in asserting his argument. In that case, a panel of this Court held that a court must consider a defendant's ability to pay before ordering the reimbursement of court-appointed attorney fees and provide some indication of such consideration. *Id.* at 254-255. However, subsequent to the briefing in the instant matter, our Supreme Court, in *People v Jackson,* 483 Mich 271; 769 NW2d 630 (2009) overruled *Dunbar, supra.*

In *Jackson*, the Supreme Court determined that the presentence determination of a defendant's ability to pay court-appointed attorney fees is not required and that *Dunbar* wrongly held otherwise. Noting that Michigan's recoupment procedure for court-appointed attorney fees is governed by MCL 769.1k, and that the statute allows for the imposition of a fee for a court-appointed attorney irrespective of a defendant's ability to pay, the *Jackson* court held that *Dunbar's* presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing. That is not to say that an ability-to-pay analysis is never required. Indeed, the *Jackson* court, recognizing that there is a substantive difference between the imposition of a fee and the enforcement of that fee, affirmatively held that an ability-to-pay analysis is required when the imposition of the fee is *enforced* and the defendant contests his ability to pay.

> Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. Even *Dunbar* recognized that these pre-enforcement challenges would be premature. Nonetheless, once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant's ability to pay. The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time. Id.* at 292.

Given the holding in *Jackson*, the trial court did not err in ordering defendant to repay court-appointed counsel's costs without conducting an ability-to-pay analysis at sentencing.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher

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Plaintiff-Appellee,

v

ARTHUR JAMES BRIDGES,

Defendant-Appellant.

UNPUBLISHED
July 10, 2008

No. 275300
Bay Circuit Court
LC No. 06-010509-FH

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals following his jury trial conviction of one count of conspiracy to deliver cocaine, MCL 333.7401(2)(a)(*iv*), and one count of possession with intent to deliver cocaine, MCL 750.157a. We affirm.

Defendant first argues on appeal that his conviction should be reversed because he was never properly arraigned on the information. Specifically, defendant contends that the circuit court's alternative arraignment procedure is facially unconstitutional and, alternatively, to the extent that the procedure is constitutional, the court failed to follow its own procedure and defendant's constitutional rights were thereby violated. We disagree. Defendant first raised this issue in a post-trial motion and, thus, the issue is not preserved. *People v Willis*, 1 Mich App 428, 430-431; 136 NW2d 723 (1965). Because defendant did not preserve the issue, he must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The right to arraignment is a procedural right guaranteed by the United States and Michigan Constitutions, and by statute. *People v Phillips*, 383 Mich 464, 470; 175 NW2d 740 (1970); US Const, Ams VI; Const 1963, art 1, § 20; MCL 767.45. The purpose of arraignment is to inform a defendant of the nature and cause of the charges pending against him. *People v Thomason*, 173 Mich App 812, 815; 434 NW2d 456 (1988). Arraignment also informs a defendant of his right to counsel, functions to fix bail and a date for the preliminary examination, and allows defendant to enter a plea. *Id.* The Michigan Supreme Court has held that if a defendant is not arraigned, then his conviction must be set aside. *Grigg v People*, 31 Mich 471, 472-473 (1875). However, failure to arraign is not grounds for automatic reversal where a defendant and all the parties go to trial "as if all formalities had been complied with." *People v Weeks*, 165 Mich 362, 365; 130 NW 697 (1911). In other words, this Court will not reverse a

conviction if it appears from the record that defendant was apprised of the charges against him, appeared prepared in court, and went to trial on the merits. *Id.*

The relevant portion of the court's alternative arraignment procedure provides:

> On or before the date scheduled in District Court at the time of bindover (formerly the date and time set for the Arraignment), the Prosecuting Attorney shall file the original Information with the Circuit Court Clerk and serve a copy upon the attorney for the defendant. . . . Defense counsel shall provide the defendant with a copy of the Information. Prior to plea or trial, the Court shall confirm on the record that the defendant received a copy of the Information. [Bay City Administrative Order No. 2006-01.]

In this case, defendant was arraigned in district court on the exact same charges. At that time, bail was fixed, the next court date was made, and defendant was informed of his right to counsel and possible punishments. Nearly a month before trial, defense counsel provided defendant with a copy of the felony information, although defendant contests this fact. Although the circuit court failed to confirm whether defendant had received a copy of the information, defendant proceeded to trial without objection and was prepared to argue the case on the merits. Given these facts, we think the purposes of arraignment were met. Defendant was fully aware of the charges from the outset and planned to try the case, as his failure to object indicates. Moreover, although defendant is entitled to arraignment, he is not allowed to remain silent about any problems with that process and then raise the issue only after a verdict has been rendered against him. See *Weeks*, *supra* at 367. The court's error did not affect defendant's substantial rights.

Defendant argues that the Court's failure to comply with its own procedure denied him the opportunity to enter a plea and engage in pretrial negotiations. However, defendant does not have a guaranteed constitutional right to a plea or to plea bargaining negotiations. See *People v Grove*, 455 Mich 439, 469-471; 566 NW2d 547 (1997). Although defendant may not have had the opportunity to make a plea, he was not denied any of his guaranteed constitutional rights. All that is required is that defendant be given a fair trial. *Id.* at 471. Nothing on the record indicates that the trial's outcome would have been different had defendant entered a plea. In fact, testimony at the *Ginther*[1] hearing established that defendant intended to maintain his innocence and go to trial.

Because we conclude that the court's error did not affect defendant's substantial rights, we need not reach the issue regarding the constitutionality of the arraignment procedure. In any event, we conclude that defendant has failed to substantiate his constitutional challenge.

Defendant's next argument is that the verdict was against the great weight of the evidence. Again, we disagree. Generally, conflicting testimony and witness credibility do not provide sufficient reasons for granting a new trial. *People v Lemmon*, 456 Mich 625, 642-643;

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

576 NW2d 129 (1998). However, courts have carved a very narrow exception to this rule, which in exceptional circumstances allows courts to "take testimony away from the jury." *Id.* at 643. To warrant overturning the jury's verdict, directly contradictory testimony must be impeached to the extent that it is deprived of probative value or the jury could not reasonably believe it, or it must defy physical reality or indisputable physical facts. *Id.* at 643-644.

Our review of the record testimony reveals that the testimony was believable and any conflict was minor. Residents living at the house all testified that defendant sold cocaine out of the house and that defendant cut up the cocaine on a green plate in the room of one resident. Police confiscated that same green plate from this room. None of their testimonies were impeached to the extent that they lacked all probative value. Nor did any of their testimonies defy physical realities. While it is possible to imagine that all the residents were lying, the issue of their credibility is better left to the jury. *Id.* at 642.

Defendant next argues that defense counsel's performance was deficient. We review the court's findings of fact at the *Ginther* hearing for clear error and all related constitutional questions de novo, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish a claim of ineffective assistance, the defendant has the burden of showing that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant contends that counsel rendered ineffective assistance for several reasons related to the court's alternative arraignment procedure. First, defendant argues that counsel acted in an objectively unreasonable manner when he allegedly failed to inform defendant of the information. At the *Ginther* hearing, defense counsel testified that he gave defendant a copy of the information approximately one month before trial. Defendant testified that he did not receive a copy of the information, although he admitted to receiving other records from counsel on that same day. At the close of the hearing, the court found counsel's testimony more credible and found that counsel had presented defendant with a copy of the information. After a review of the record, we do not think that the court made a mistake in coming to this conclusion. We will not displace the trier of fact's judgment as to the witnesses' credibility. *Lemmon*, *supra* at 642.

Second, defendant contends that counsel was ineffective because counsel neither objected to the court's failure to confirm defendant's receipt of the information, nor did he object to the alternative arraignment procedure as unconstitutional. The parties did not address counsel's failure to object during the *Ginther* hearing. Thus, we are left to speculate as to why counsel did not object on either ground. However, even assuming that counsel had acted below an objective standard of reasonableness, there is no reason to assume that the objection would have changed the outcome of the trial. Counsel testified at the *Ginther* hearing that there was no plea bargain offer from the prosecution and that defendant had continuously maintained his innocence. According to counsel, the intended plan was to take the case to trial. At most, had counsel objected, the effect would have been preservation of a constitutional issue and compliance with the arraignment procedure. "Errors which cannot possibly create any prejudice to the rights of one charged with crime ought not to, and cannot, operate as a ground for a new trial." *People v Wade*, 101 Mich 89, 91; 59 NW 438 (1894).

Defendant's last argument on appeal is that the evidence was insufficient to support his convictions. We disagree. To support a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecution must prove the following four elements beyond a reasonable doubt: "(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992).

Defendant believes that the evidence was insufficient to support a finding that he possessed the confiscated cocaine. To show that defendant possessed the cocaine, the prosecution must show that defendant "exercised dominion or control over the substance." *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). Possession can be actual or constructive, as well as joint or exclusive. *Id.* A defendant's mere presence where drugs are located is not enough to establish constructive possession. *Wolfe*, *supra* at 520. Rather, some additional connection between defendant and the substance must be shown to establish that defendant possessed the drug. *Id.*

In this case, evidence showed that defendant was working with others to sell cocaine and that defendant, on the day of the incident, had purchased cocaine and returned to the house. Four of the home's residents all testified that defendant used one of their rooms as a place to cut up cocaine on a green plate. When police raided the house, they found cocaine on a green plate in that room. Testimony also indicated that defendant admitted his two cell phones were found in the room. Shortly before the raid, defendant, according to testimony, had directed two of these witnesses (including the one whose room was used to cut the drug) to sell $75 worth of cocaine. In our view, these facts are sufficient to conclude that defendant possessed the cocaine.

Defendant also alleges that the testimonies of each of the witnesses lacked credibility because of their drug addictions, long criminal histories, and the charges pending against them in the instant matter. However, it is for the trier of fact, and not this Court, to weigh the credibility of a witness's testimony at trial. *McKinney*, *supra* at 165. In this case, the jury found the witnesses' testimonies credible. We will not second-guess that determination on appeal.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

EXHIBIT C

EXHIBIT D

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAPREE SHAHEB GAMBLE,

Defendant-Appellant.

UNPUBLISHED
June 10, 2008

No. 276034
Jackson Circuit Court
LC No. 05-007197-FH

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), and the trial court sentenced him as an habitual offender, third offense, MCL 769.11, to a prison term of 15 to 40 years. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the seizure of cocaine on February 9, 2005, by Jackson Police Officer Sergio Garcia and other members of the Jackson Narcotics Enforcement Team while investigating an anonymous tip that drugs were inside an apartment. Upon arriving at the apartment, Officer Garcia smelled the odor of burning marijuana. Another officer knocked on the door and announced that he was the maintenance man. According to Officer Garcia's trial testimony, Lekia Lewis opened the door and began to exit the apartment. Upon seeing Officer Garcia, Lewis shoved him and tried to return to the apartment and shut the door. Officer Garcia and other officers entered the apartment behind Lewis. Lewis, defendant, and two other men were secured in the living room. After Lewis consented to a search of the apartment, a digital scale and cocaine in rock and powder forms were found in the kitchen. A thumbprint on a plastic sandwich bag containing cocaine was later identified as belonging to defendant.

Lewis was initially included in defendant's witness list, dated August 28, 2006, but was ultimately called as a prosecution witness on November 28, 2006,which was the first day of trial, pursuant to an immunity agreement dated that same day. The immunity agreement precluded the prosecutor from charging Lewis with perjury. Lewis testified that the cocaine in the apartment belonged to defendant, that defendant is the father of her young daughter, and that defendant had a residence of his own but spent approximately half of his time at her apartment. Defendant testified that he was at the apartment on February 9, 2005, because Lewis invited him over for dinner and to visit his daughter. Defendant conceded that he must have touched the sandwich

bag containing his thumbprint, but testified that the cocaine did not belong to him. The jury found defendant guilty of possessing the cocaine.

II

Defendant first argues that he was denied the effective assistance of counsel by defense counsel's failure to move to suppress the cocaine evidence. He asserts that defense counsel should have at least moved to join codefendant Lewis's motion to suppress in a separate case against her so that he could appeal the trial court's adverse ruling.

Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to errors apparent from the record.[2] *People v Jordan,* 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's error, the result of the proceeding would have been different. *Id.* at 667. "Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant's reliance on Lewis's trial testimony to establish defendant's standing to raise a Fourth Amendment challenge to the search of the apartment is misplaced. In this regard, we may not assess defense counsel's performance with the benefit of hindsight. *People v Rockey,* 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Although defense counsel had a duty to make a reasonable investigation, or to make a reasonable decision that an investigation was unnecessary with respect to this evidentiary matter, the reasonableness of defense counsel's actions must be evaluated in light of defendant's own statements or actions. *Strickland v Washington,* 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's present claim of standing is contradictory to his testimony at trial that he was a mere visitor in the apartment. See *People v Parker,* 230 Mich App 337, 340-341; 584 NW2d 336 (1998) (defendant lacked standing to contest a search of an apartment because the evidence established that he was a mere visitor and did not have a legitimate expectation of privacy). Defendant has not shown that defense counsel acquired information during his pretrial investigation of the case that would support defendant's standing to contest the search of the apartment at or before trial. Therefore, defendant's ineffective assistance of counsel claim fails.

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[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

[2] Because the full transcript of the suppression hearing in Lewis's separate case was not filed in the trial court, we will not consider defendant's claim to the extent that he relies on portions of that transcript that were not filed below. Further, we will not consider the credibility determinations made by the trial court when denying Lewis's motion. Rather, we shall confine our review to the evidence at defendant's trial. Further, while this Court is not in a position to make credibility determinations on appeal, we note that there is nothing about Officer Garcia's trial testimony that raises concerns about the physical plausibility of Lewis shoving him after she opened the door to the apartment. There is nothing about that testimony that defies indisputable physical facts or realities. See *People v Lemmon,* 456 Mich 625, 643; 576 NW2d 129 (1998).

See *People v Carbin,* 463 Mich 590, 600-601; 623 NW2d 884 (2001) (defendant has the burden of establishing factual predicate for claim).

Further, to the extent that defendant challenges the validity of Lewis's consent to search by attacking the legality of the police conduct directed at Lewis, defendant has not established his standing to seek exclusion of the evidence on this ground. The mere fact that a person is damaged as a consequence of a search and seizure directed at someone else does not confer standing to object to the admission of evidence. See *Alderman v United States,* 394 US 165, 171-173; 89 S Ct 961; 22 L Ed 2d 176 (1969). Codefendants are not accorded any special standing. *Id.* at 172; *United States v Williams,* 354 F3d 497, 511 (CA 6, 2003); *People v Atkins,* 96 Mich App 672, 678; 293 NW2d 671 (1980). "Fourth Amendment rights are personal in nature and may not be asserted vicariously." *People v Armendarez,* 188 Mich App 61, 71; 468 NW2d 893 (1991).

Defendant has not shown that a motion to suppress the evidence, or a belated request to join in Lewis's previously denied motion, would have been anything but futile. Defense counsel is not ineffective for failing to make futile motions. *Rodgers, supra* at 715.

III

Next, defendant argues that the trial court abused its discretion by denying his request at trial for an opportunity to obtain a copy of a letter that Lewis allegedly wrote to him while he was incarcerated in jail. We disagree.

The trial court had discretion to prohibit the evidence because defense counsel failed to provide the proposed letter to the prosecution during discovery. MCR 6.101(J). All relevant circumstances may be considered in determining an appropriate remedy for a discovery violation. *People v Greenfield (On Reconsideration),* 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006); see also *Taylor v Illinois,* 484 US 400, 414-415; 108 S Ct 646; 98 L Ed 2d 798 (1988). In general, "[a] trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young,* 276 Mich App 446; 740 NW2d 347 (2007). The record discloses that defense counsel waited until after Lewis finished testifying to bring this issue to the attention of the trial court, even though he had learned about the letter one week earlier. Counsel failed to offer an adequate explanation for the delay or a specific purpose for the letter evidence. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request.

Defendant also argues that the trial court abused its discretion by not allowing him to testify regarding the contents of the letter. A trial court's decision to exclude evidence is reviewed for an abuse of discretion, but any preliminary questions of law bearing on the admissibility of evidence is reviewed de novo. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). The proponent of evidence has the burden of establishing a proper foundation for its admissibility. *People v White,* 208 Mich App 126, 131; 527 NW2d 34 (1994). Under MRE 103(a)(2), the substance of any excluded evidence must be shown by offer of proof, unless it is apparent from the context in which questions are asked.

The trial court sustained the prosecutor's hearsay objection when defendant attempted to testify regarding the contents of the letter in response to defense counsel's question, "[s]he

indicates to you that she thought you had taken up with someone else?" Although the record is adequate to satisfy the requirement in MRE 103(a)(2) that the substance of the proposed testimony be disclosed, defense counsel failed to offer a permissible nonhearsay purpose of the proposed testimony. Therefore, the trial court did not abuse its discretion by excluding it.

To the extent that defendant now argues that the proposed testimony was relevant to show Lewis's bias or impeach her credibility by use of a prior inconsistent statement, the claim is unpreserved because neither purpose was identified in an offer of proof at trial. *People v Hackett,* 421 Mich 338, 352; 365 NW2d 120 (1984). Therefore, defendant must show a plain error affecting his substantial rights. MRE 103(d); *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant has failed to establish either a plain error or that his substantial rights were affected. "Bias" refers to the relationship between a party and a witness that might lead a witness to slant testimony for or against a party. *People v Layher,* 464 Mich 756, 762-763; 631 NW2d 281 (2001). Although evidence of bias is almost always relevant, *id.* at 763, evidence of a witness's written statement may still be excluded for failure to satisfy foundational requirements, such as authentication, or because of the rule against hearsay. *People v Jenkins,* 450 Mich 249, 260; 537 NW2d 828 (1995). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Based on the limited offer of proof made at trial, it is not apparent that defendant's proposed testimony would have been probative of Lewis's bias against defendant, or that other foundational requirements for its admissibility would be satisfied.

Similarly, we are not persuaded that defendant's proposed testimony regarding the contents of the letter would have been admissible to impeach Lewis's trial testimony. Given defendant's failure to demonstrate that Lewis was subject to cross-examination regarding the contents of the letter or that she made her statements under oath, defendant's reference to MRE 801(d)(1)(A) is misplaced.[3]

Further, defendant has not shown any basis for allowing his proposed testimony for impeachment purposes, given that defense counsel never sought to cross-examine Lewis regarding the letter. The mere fact that Lewis denied knowledge of defendant's involvement with an unidentified woman in Battle Creek, while she was in prison, did not establish a foundation for defendant's proposed testimony.[4] Under MRE 613(b), "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to

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[3] MRE 801(d)(1) provides that a statement is not hearsay if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

[4] We note that the trial court specifically asked defense counsel during his cross-examination of Lewis if he could provide the name of the woman, but that defense counsel declined to provide this information.

interrogate the witness thereon, or the interests of justice otherwise require." A proper foundation under this rule requires that the proponent of the evidence "elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness." *Barnett v Hidalgo,* 478 Mich 151, 165; 732 NW2d 472 (2007). Extrinsic evidence is not allowed to impeach the witness on a collateral matter. *Id.*

We also reject defendant's newly raised claim that he was denied his constitutional right to present a defense by the exclusion of the contents of the letter. The right to present a defense may be limited by established rules of procedure and evidence designed to assure fairness and reliability in the ascertainment of guilt or innocence. *People v Toma,* 462 Mich 281, 294; 613 NW2d 694 (2000). Therefore, defendant's failure to demonstrate procedural or evidentiary error is dispositive of this claim.

Finally, we find no merit to defendant's claim that the trial court's ruling served to limit his right to cross-examine Lewis. The right of cross-examination guarantees a defendant a reasonable opportunity to test the truth of a witness's testimony. *People v Adamski,* 198 Mich App 133, 138; 497 NW2d 546 (1993). In this case, the trial court did not impose limitations on defense counsel's ability to cross-examine Lewis about prior statements bearing on her relationship with defendant or any other matter probative of credibility. Further, defense counsel was afforded an opportunity to impeach Lewis's credibility by cross-examining her regarding her prior guilty plea, which she tendered pursuant to a plea agreement, as well as her testimony that she lied under oath in earlier proceedings to protect defendant because she believed that he would face a lengthy prison sentence if he were convicted. Further, the jury was informed that Lewis was testifying pursuant to an immunity agreement and anticipated that the prosecutor would provide favorable information to the parole board so that she could be released from prison at the earliest possible time. Lewis testified that she initiated contact with the prosecutor through her brother and by letter, offering to testify as a prosecution witness, because she believed that she was going to be called as a defense witness, she was trying to make changes in her life, and, although she still loved defendant, she did not want to lie again. Considering the record as a whole, defendant was not deprived of his right of cross-examination. We find no error, plain or otherwise.

Because defendant has failed to demonstrate any error, it is unnecessary to consider defendant's request for a remand for a hearing to determine whether he was prejudiced by the exclusion of the letter. In passing, we note that this Court previously denied defendant's motion to remand regarding this issue. Although enlargement of the record on appeal is generally not permitted, *People v Warren,* 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds, 462 Mich 415 (2000), we note that even if we were to consider the copy of the letter submitted by defendant in support of the motion, it would not alter our conclusion that defendant has failed to demonstrate any basis for relief. The letter is consistent with Lewis's trial testimony that she still loved defendant. We are not persuaded that the letter would be material to Lewis's credibility, even if a proper foundation for its admission could be established.

IV

Defendant next argues that he is entitled to resentencing because he was sentenced on the basis of inaccurate information. We disagree. To properly preserve a challenge to the trial court's statements suggesting that defendant was involved in dealing cocaine, defendant should have moved for resentencing. MCR 6.429(C); MCL 769.34(10). Absent a proper motion, we limit our review to whether defendant has established a plain error affecting his substantial rights. *People v Kimble,* 470 Mich 305, 312; 684 NW2d 669 (2004).

It appears that the trial court overstated defendant's employment income as approximately $3,000 a year based on his trial testimony, inasmuch as defendant estimated that his income for 2004 was "probably anywhere from fifteen hundred to two thousand dollars." Defendant testified that he received additional money and other assistance, such as the use of a vehicle, from relatives when he needed it. He claimed to have possessed $340 in cash when the police entered Lewis's apartment on February 9, 2006, because Lewis gave him approximately $320, although he did not know why she would give him the money. Regardless of the sources of assistance provided to defendant and his outstanding child support obligations, it was reasonable for the trial court to infer from evidence that defendant was living well in relation to his employment income.

In any event, the trial court's decision indicates that it considered defendant's limited employment income as additional support for its conclusion that defendant was dealing in cocaine. There was other evidence to support the trial court's conclusion, including the scale found in the apartment, which Officer Garcia testified was the type of scale used to break down cocaine into smaller quantities for street sales. Further, consistent with the information in the presentence report, the trial court observed that the total quantity of cocaine seized was approximately 119 grams. Intent to deliver can be inferred from the amount of cocaine possessed. *People v Ray,* 191 Mich App 706, 708; 479 NW2d 1 (1991). Therefore, the trial court's belief that the circumstances were suggestive of defendant's involvement in dealing cocaine was not plain error. Resentencing on this ground is not warranted.

We also reject defendant's challenges to the length of his sentence. Because the minimum sentence is within the guidelines range and defendant has not established either a scoring error or that the sentence was based on inaccurate information, we must affirm the sentence. MCL 769.34(10). Further, the sentence does not violate the Eighth Amendment prohibition against cruel and unusual punishment. *People v Drohan,* 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Finally, the trial court's statement that it was imposing a sentence within the guidelines range was sufficient to satisfy the articulation requirement. *People v Conley,* 270 Mich App 301, 312-313; 715 NW2d 377 (2006). It was not necessary for the trial court to explain why it was imposing a sentence at a particular point within the guidelines range.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

EXHIBIT E

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE LAMONT WILSON,

Defendant-Appellant.

UNPUBLISHED
June 9, 2009

No. 277572
Kalamazoo Circuit Court
LC No. 06-000513-FC

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant Tyrone Lamont Wilson appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant successfully moved this Court to remand his case for an evidentiary hearing regarding his claims that a discovery violation occurred and his trial counsel was ineffective. After the August 29, 2008, evidentiary hearing, the trial court denied defendant's motion for a new trial premised on those claims of error. In defendant's supplemental brief on appeal, he argues that the trial court made clearly erroneous findings of fact and abused its discretion in denying his motion. We disagree.

I

We first address defendant's discovery violation claim. Because defendant did not object to the third, late-discovered bullet or the January 2007, ballistics report pertaining to the bullet at trial, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). We generally review a trial court's factual findings for clear error, and its decision to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Although there is no general constitutional right to discovery in criminal cases, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), MCR 6.201(A)(3) and (6) require mandatory

disclosure "upon request" of an expert's report and other tangible physical evidence. Defendant made no such request in the case at bar. We therefore find no violation of the discovery rules.

Defendant also argues that a violation under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), occurred because exculpatory and material evidence was withheld by the prosecution. There are three instances where a defendant's constitutional due process right to discovery may be involved:

> (1) where a prosecutor allows false testimony to stand uncorrected; (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed; or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. [*People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997).]

Evidence is material where it is exculpatory evidence that would create a reasonable doubt regarding the defendant's guilt. *United States v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976), overruled in part as stated in *Kowalczyk v United States*, 936 F Supp 1127 (1996). "Favorable evidence is defined as all 'evidence which * * * might have led the jury to entertain a reasonable doubt about * * * guilt'." *People v Lane*, 127 Mich App 663, 670; 339 NW2d 522 (1983) (citations omitted).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

We conclude that the trial court did not err in finding that a *Brady* violation did not occur. First, the ballistics report and bullet were not favorable to defendant because they did not create a reasonable doubt about his guilt. *Lane*, *supra*. If anything, they were further evidence contradictory of defendant's version of the facts because they showed that the bullet was consistent with being fired from defendant's .32-caliber gun and was located, similar to the other bullets, in the hallway, and not in the stairway where defendant insisted the shooting took place. In fact, this bullet was underneath the carpeting where the victim came to rest.

Second, if, as defendant claims, he did not possess the evidence, he failed to prove that he could not have obtained it with reasonable diligence. Defense counsel conceded at the evidentiary hearing that the prosecutor's office allowed her to visit the office and view the evidence at any time. The prosecutor testified that he and defense counsel went to his office and reviewed the evidentiary materials after the settlement conference on January 12, 2007, that he had received the ballistics report earlier that week, and that part of his purpose in reviewing the materials with defense counsel was to be sure she was aware of the newly received ballistics

report, the arrival of which obviated the need for yet another adjournment of trial.[1] Further, the record does not support defendant's argument that defense counsel was unaware of the evidence. The prosecutor specifically informed the trial court and defense counsel on the record at the October 9, 2006, motion hearing that another bullet was found at the scene of the shooting by the homeowner when she was pulling up the blood-stained carpeting to clean the area where the victim's body had been found, she gave the bullet to Detective Jeffrey Johnson, and the bullet was being sent to the laboratory for testing:

> I would also indicate for the Court, as I indicated to Ms. Converse before the Court took the bench, that I was just informed by Detective Jeff Johnson . . . that while he was serving a witness who owned the home where the shooting actually took place she indicated to him that as she was cleaning an area where the victim's body had been found and where the shooting allegedly took place she found what appeared to be a bullet fragment under the carpet when she pulled the carpeting up. This bullet fragment was given to Jeff Johnson, and he is in the process today of packaging that and sending that to the Michigan State Police laboratory for comparison purposes.
>
> We need to determine whether or not that round came from the weapon fired allegedly by the defendant or whether or not it was a round fired allegedly by the victim in this case.
>
> And I would also state for the Court's benefit that this case does involve the possibility of multiple guns, one belonging to the defendant and one belonging to the victim. There's a possibility that there was a firefight between the two of them. Self-defense may be an issue raised by the defense.
>
> Hence, we need to determine the exact locations of the individuals involved and what rounds belong to what weapon so we can determine who fired what and when and where.
>
> In light of all of these complicated issues, your Honor, I would ask that if the defense motion [for expert witness fees and to adjourn trial] is granted that we at least do adjourn the trial so that all of these things can be wrapped up in a timely manner . . . . Also, we not waste resources serving [witnesses] for a week—or a trial in two weeks that would only be adjourned by necessity, nonetheless.

Defense counsel also had the detective's October 6, 2006, police report documenting the discovery of the bullet. On the third day of trial the homeowner, Tawana Simpson, testified about her discovery of the bullet in the corner where the victim was found, which she gave to Detective Johnson, and defense counsel cross-examined her. Defense counsel also cross-examined two other officers/laboratory technicians regarding the bullet on the fifth day of trial.

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[1] The trial of this matter began on February 13, 2007.

On the sixth day of trial, defendant offered no objection when Detective Johnson testified about the bullet and it was admitted into evidence. Detective Johnson also testified about the fact that the bullet had been sent to the Michigan State Police laboratory. Further, when Jeff Crump, the firearms examiner, testified about the bullet and the ballistics report that is at issue, defense counsel offered no objection to the evidence or claimed any surprise or lack of disclosure. Although defense counsel later testified at the evidentiary hearing that she was so "shocked" by the evidence she failed to object or request a continuance, the trial court did not err in concluding that her decision not to object was strategic. Defense counsel was an experienced criminal defense attorney, and during Crump's testimony, an extensive separate record occurred outside the presence of the jury in her attempt to question Crump regarding unrelated matters. Despite this lengthy pause in the trial, defense counsel never raised an objection at that or any other time during trial.

Third, the defendant failed to prove that the prosecutor suppressed the evidence. In fact, defendant conceded that there was no intentional wrongdoing by the prosecutor in this case. The prosecutor clearly disclosed the existence of the bullet at the October 9, 2006, motion hearing, and after he received the ballistics report he asked defense counsel to come to his office following the pre-trial settlement conference to review all the evidence before trial. Further, the ballistics report was introduced without objection at trial.

Finally, defendant has failed to establish that but for the alleged non-disclosure of the ballistics report, a reasonable probability exists that the outcome of the proceedings would have been different. *Carines*, *supra*. The ballistics report did not constitute crucial evidence in light of all of the other evidence at trial indicating that the shooting occurred in the hallway and that defendant did not shoot the victim under circumstances constituting self-defense or voluntary manslaughter.

Defendant failed to establish any of the four necessary prongs for a *Brady* violation, and consequently, failed to establish that a plain error occurred. *Id.*

II

Next, defendant claims that his trial counsel rendered ineffective assistance because she failed to object to the ballistics evidence, she forgot about this evidence, she failed to present a voluntary manslaughter defense as a result of the evidence, and defendant was thereby deprived of a substantial defense. We review the trial court's findings of fact for clear error and questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defense counsel's performance is presumed to be effective, and a defendant bears the heavy burden of demonstrating otherwise. *Id.* at 578. A defendant must show that defense counsel's performance was deficient according to an objective standard of reasonableness considering the prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must also prove that he suffered prejudice as a result of the deficient performance, such that there is a reasonable probability that, absent the error, the outcome of the trial could have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). In addition, defendant bears the "burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As discussed, the record does not support a conclusion that the prosecutor failed to advise defense counsel about the bullet and the ballistics report or make both available for inspection; thus, defense counsel had no reason to object to any discovery violation. Further, the record reflects that defense counsel became aware of the bullet at least by October 9, 2006, and went with the prosecutor after the January 12, 2007, settlement conference to review his file and the materials for trial, which at that time purportedly included the ballistics report. Finally, multiple witnesses testified at various points in the trial prior to the introduction of the ballistics report about the bullet, where it had been found, and that it had been sent to the Michigan State laboratory for analysis. Therefore, we conclude that defense counsel's performance fell below an objective standard of reasonableness in allegedly forgetting about the ballistics report. However, defendant has failed to establish that, but for this error, it is reasonably likely that the outcome of the trial would have been different. *Pickens*, *supra*. As previously stated, the ballistics report did not constitute crucial evidence in light of all of the other evidence at trial indicating that the shooting occurred in the hallway and that defendant did not shoot the victim under circumstances constituting self-defense or voluntary manslaughter.

Next, we find that defendant's contention that defense counsel was ineffective for failing to request a continuance or adjournment or object to the evidence lacks merit. There is no claim by defendant or any other basis upon which to conclude that Crump's report was inaccurate or deficient. Defendant has also failed to show that he suffered any prejudice, *id.*, or explain and support how a continuance would have benefited him. Because the trial court did not err in concluding that there was no discovery violation, defense counsel was not ineffective for failing to raise a meritless objection to an alleged discovery violation or to request an unnecessary continuance. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We also reject defendant's argument that he suffered prejudice because defense counsel did not present an argument that was consistent with the evidence of the third bullet found in the basement, which clearly negated that the shooting took place on the stairs as testified to by defendant. Defense counsel's decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming this strong presumption; this Court will not substitute its own judgment for defense counsel's judgment. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); see also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that a chosen strategy does not work does not render defense counsel's performance deficient. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defense counsel's role is "to choose the best defense for the defendant under the circumstances." *Pickens*, *supra* at 325. Further, "'every effort (must) be made to eliminate the distorting effects of hindsight,' and []'the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *LaVearn*, *supra*, quoting *Strickland*, *supra* at 689. Where defense counsel is "faced with a choice between two defenses with significant evidentiary problems[,]" and decides to "eschew[] the weak defense that offered the possibility of a [less culpable] conviction, in favor of the weak defense that offered the possibility of a complete acquittal and that avoided the ethical problems that would have arisen had the defendant testified that he lacked the intention to kill[,]" defense counsel's performance is not deficient. *LaVearn*, *supra*.

The record reflects that defense counsel investigated the case by speaking with defendant, reviewing the prosecutor's evidence, visiting the crime scene, and obtaining her own experts. Based on the feedback from her ballistics expert, she considered raising a voluntary manslaughter defense, but, she ultimately chose to pursue self-defense and defense of others because defendant insisted on this defense and did not want to pursue voluntary manslaughter. Defendant maintained at all times that he shot the victim in the stairway to protect himself and his friend. The chosen defense therefore followed defendant's own testimony, even though defendant's description of the location of the shootout conflicted with other evidence at trial. Defense counsel chose to pursue a strategy that could have resulted in a complete acquittal instead of culpability for a lesser offense. *Id.* Defense counsel's testimony at the evidentiary hearing revealed that she did not change to a manslaughter theory at trial after the report was revealed because of a strategic trial decision, specifically that she had already set forth the self-defense and defense of others theory during the opening statement. Furthermore, defense counsel did not present a theory that was wholly unsupported by the evidence. The theory was consistent with defendant's own testimony, evidence of the .25-caliber spent casing at the bottom of the steps and the .25-caliber gun near the victim, and some of the witnesses' testimony. Testimony established that the bullets could have been shot from the stairway and ricocheted into the hallway, even though other evidence made this theory unlikely. Defendant nevertheless maintained that the shooting occurred in the stairway and he was never in the hallway, even though he testified after the prosecution presented strong evidence that the shooting occurred in the hallway. Defense counsel could not have asked defendant to lie and testify that he was in the hallway. And, the jury could have chosen to believe defendant over the other witnesses' testimony that he was in the hallway, especially considering that the other witnesses had credibility issues. On the record, the trial court did not err in finding that defense counsel's chosen strategy and decision not to deviate from it did not constitute ineffective assistance of counsel.

Moreover, we conclude that, even if defense counsel had pursued a voluntary manslaughter defense, this would not have affected the outcome of the trial. The jury was instructed on voluntary manslaughter, yet found defendant guilty of first-degree murder. The record does not support that defendant was adequately provoked and acted in the heat of passion without a sufficient lapse of time during which to cool his passions. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Rather, the evidence indicated that defendant possessed the gun for some time before the shooting, was aware that the victim and defendant's best friend had a dispute over a woman, and defendant was known to do whatever his best friend asked of him. Defendant then went with his gun to a friend's house where he knew the victim was present. Defendant and his friends first pounded on and kicked the front door of the house for several minutes, yelling and demanding to be allowed inside, and defendant assisted one member of the group in breaking into the house through a window. Defendant then entered and went immediately down the stairs to where the victim was located. There was no evidence that the victim provoked this attack. There is also no evidence that defendant acted in the heat of passion without a reasonable time to cool off when he and his friends drove from Missouri to the friend's house in Kalamazoo and spent several minutes pounding on the door before the shooting. Defendant shot the victim twice from behind, whereafter the victim's shoes were removed and he was robbed of his marijuana and cellular telephone. Defendant ascended the stairs calmly afterwards, and a friend joked with him that defendant had emptied all of the chambers of his revolver. Defendant and the others then fled from police, defendant tried to wash the gunpowder

residue from his hands, defendant threatened the driver of the van in which they traveled that he would shoot her if she did not drive away from the police, and defendant instructed the others not to tell the police anything. On the record, we find no prejudice and defendant has failed to establish that he was deprived of the effective assistance of counsel. *Pickens*, *supra* at 314.

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis

EXHIBIT F

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT EDWARD HENSLEY,

Defendant-Appellant.

UNPUBLISHED
January 20, 2009

No. 280781
Monroe Circuit Court
LC No. 07-035886-FH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of malicious destruction of a building over $1,000 to $20,000, MCL 750.380(3)(a), and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 48 to 120 months' imprisonment for the malicious destruction of property conviction and 278 to 480 months' imprisonment for the first-degree home invasion conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, accompanied by his friend Michael Grice, drove to Terry Pierce's home to retrieve his wife, Reida Hensley, and take her back to Florida. Hensley was living with Pierce, although she was not home at the time of these events. Defendant pounded on Pierce's front door with such force that the steel door began to bend. When Pierce informed defendant that Hensley was not at home and that he had a gun, defendant replied, "I don't give an F, that no gun—when no .25 is gonna stop me." Fearing for his life, Pierce shot at defendant through the door.

Defendant then got into his van and rammed Pierce's house with the vehicle. The force of the impact buckled the aluminum siding, bowed the living room window inward, and damaged the studs and drywall on the interior of Pierce's home. After hitting the front of the structure, defendant then caused his vehicle to strike the back of the house, which resulted in the denting of a section of aluminum siding and breaking off part of the deck railing.

Defendant first asserts that interference by the interpreter deprived him of his right to cross-examine the witness, Grice, during trial. Because defendant failed to object to the interpreter's actions at any time during the contested testimony, we review this issue for plain error that affected defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Dunbar,* 264 Mich App 240, 251; 690 NW2d 476 (2004). Reversal

is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, *supra* at 763-764.

Although hearing impaired, Grice was not completely deaf and had the ability to read lips. While testifying, Grice demonstrated some difficulty hearing and understanding the questions posed to him. In addition, persons in the courtroom experienced problems with understanding some of his responses. Because of this breakdown in communication, the trial court instructed its clerk, Kelly Gabriel, who was fluent in the sign language alphabet, but not certified as a signer in American Sign Language, to translate Grice's answers through the use of the signed alphabet when needed. Both the prosecutor and the defense attorney stated they had no objections to Gabriel assisting when necessary.

Defendant cites several examples where he asserts Gabriel, acting as an interpreter, took liberties by trying to explain to Grice what was being asked, gave summaries of what was being said, and in asking questions, all of which are contrary to the proper role of an interpreter as delineated by this Court in *People v Cunningham*, 215 Mich App 652; 546 NW2d 130 (1999). The *Cunningham* Court held that, "[a]s a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said." *Id.* at 654.

This case is distinguishable from *Cunningham* for several reasons. First, this case involved the interpretation of sign language from an English speaking witness who was hearing impaired. Unlike the witness in *Cunningham*, the courtroom was privy to much of Grice's testimony without the aid of an interpreter. Grice spoke and understood English and individuals in the courtroom understood the majority of Grice's testimony without the aid of an interpreter. Unlike *Cunningham,* the interpreter's purpose in this case was to clarify questions to the witness and answers by the witness *when necessary*. The record does not reflect any attempt by the interpreter to give summaries of the witness' testimony, as alleged by defendant.

Second, the record does not support defendant's assertion that a portion of the testimony subject to the use of sign language was not translated for the trier-of-fact. Defendant also alleges that the interpreter interfered by trying to explain questions to defendant. However, the record fails to support this allegation. There were only occasional and minor lapses in the simultaneous and literal translation of Grice's testimony, which was likely due to the interpreter's use of the sign language alphabet. These minor lapses in the translation did not deprive defendant of his right to confrontation. There is also no indication that the interpreter altered Grice's testimony or interfered with the ability of those in the courtroom to understand Grice's testimony. Even though the cross-examination of Grice was often tedious, counsel was able to convey the meaning of his questions and obtain responsive answers. *Cunningham, supra* at 654-655.

Finally, unlike *Cunningham*, trial counsel never objected to the testimony interpreted by Gabriel. There was no indication by the judge, counsel, or jurors to suggest that Gabriel was taking liberties in translating the questions posed to Grice or his responses.

Defendant next asserts that his conviction for first-degree home invasion must be reversed because he was denied the right to a unanimous verdict. Defendant contends the trial court erred when it failed to give an instruction advising the jury that it had to unanimously agree on the specific act that formed the basis for its finding of first-degree home invasion. We review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 764.

At trial, the prosecution presented evidence that either of the following would prove the single count of first-degree home invasion: 1) driving the van into Pierce's home; or 2) walking through the attached porch and violently banging on the door and threatening Pierce, who was inside. The jury was not instructed that it had to unanimously agree on the particular act that formed the basis for its finding of first-degree home invasion. Rather, the trial court instructed the jury that, "[a] verdict in a criminal case must be unanimous. In order to return a verdict it is necessary that each of you agrees on that verdict."

After instructing the jury, the trial court asked defense counsel if he would like to address the court regarding the instructions. Counsel voiced no dissatisfaction with the instructions and expressly requested the trial court to *not* give a specific unanimity instruction, stating that it might confuse the jury if they were presented with two theories for the home invasion charge. Counsel's express approval of the trial court's jury instructions constituted a waiver of this issue, which has extinguished any error on appeal. *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights for his waiver has extinguished any error." *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007), quoting *Carter, supra* at 215.

Next, defendant argues in his Standard 4 supplemental brief that there was insufficient evidence presented at trial to support his first-degree home invasion conviction. We review sufficiency of the evidence challenges in a criminal trial de novo. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). In reviewing the sufficiency of the evidence, we determine whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In determining whether sufficient evidence had been presented to support a conviction, this Court "will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

To support a conviction of first-degree home invasion, the prosecution must prove that defendant did the following: (1) entered the dwelling without permission; (2) while intending to commit a larceny or assault, or actually committing a larceny or assault while entering, exiting or while in the dwelling; and (3) that either another person was lawfully present in the dwelling at the time or defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). The home invasion charge in the instant case was based on defendant committing an assault. An assault is defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant,* 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson,* 407 Mich 196, 210; 284 NW2d 718 (1979). A battery is

defined as '"the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault.'" *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), quoting *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940).

The prosecution offered two theories in support of the first-degree home invasion charge. First, it contended that defendant entered Pierce's porch and assaulted Pierce by banging on the door with such force that it bent the door inward, while threatening to kill Pierce. The prosecution's second theory was that defendant assaulted Pierce when he drove his van into Pierce's home.

Defendant argues there was insufficient evidence to convict him of first-degree home invasion because he did not intentionally drive his vehicle into Pierce's home and that at no time did the vehicle actually penetrate the structure. However, it is clear from the testimony at trial that defendant's act of driving his vehicle into Pierce's home was intentional. Pierce and his children testified that while defendant was on the porch of his home, he violently banged on the door and threatened Pierce. Seconds later, defendant drove his vehicle into the home, penetrating the drywall of the living room. Admissions by Grice and defendant to the police placed defendant behind the wheel of the vehicle at the time of impact. This evidence satisified the elements of first-degree home invasion because it demonstrated that defendant (1) entered Pierce's house without permission by setting his vehicle in motion, (2) when entering the dwelling with his vehicle, defendant willfully committed an unlawful act that placed Pierce in reasonable apprehension of receiving an immediate harmful or offensive touching, and (3) defendant and his children were lawfully present in the dwelling at the time of the incident. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of first-degree home invasion. *Robinson, supra* at 5.

Defendant also argues the evidence was insufficient to convict him of first-degree home invasion because he never entered the dwelling, but only entered the enclosed porch, which led to the door that allows direct access to the house. For purposes of the home invasion statute, "a dwelling" is specifically defined as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a). It was established at trial that to get to the front door of Pierce's home, one first has to walk though a screened-in porch. Under the first-degree home invasion statute, the enclosed porch attached to the home clearly qualified as an appurtenant structure to the dwelling.

Defendant also asserts that he was denied the effective assistance of counsel because his trial counsel failed to request the trial court to instruct the jury on the lesser-included offense of breaking and entering. Defendant failed to move for a new trial or an evidentiary hearing on his claims of ineffective assistance of counsel. Therefore, our "review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689-690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). To overcome this presumption, defendant must meet a two-pronged test. Defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness

under the circumstances and according to prevailing professional norms. *Strickland, supra* at 687-688; *Pickens, supra* at 312-313. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland, supra* at 693; *Pickens, supra* at 309.

The decision to request or refrain from requesting a lesser offense instruction is generally considered to be a matter of trial strategy. See *People v Sardy,* 216 Mich App 111, 116; 549 NW2d 23 (1996). "The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Therefore, one cannot conclude that counsel was ineffective solely because it refrained from requesting the lesser offense instruction of breaking and entering.

"[B]reaking and entering without permission is a necessarily included lesser offense of first-degree home invasion." *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). "It is impossible to commit the first-degree home invasion without first committing a breaking and entering without permission. The two crimes are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.* "A trial court, upon request, should instruct the jury regarding any necessarily included lesser offense, or an attempt, (irrespective of whether the offense is a felony or misdemeanor), if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it." *Id.* at 388. However, this does not mean that the jury should always be instructed on a lesser-included offense where the only difference between the greater and lesser offenses is the intent element. Further, the evidence supporting the lesser offense must be "substantial." *Id.* at 388 n 2.

In the instant case, defendant's intent upon breaking and entering was at issue. Defendant contends that his actions at Pierce's home were merely intended to retrieve his wife and not to commit an assault. In addition, defendant asserts that he did not intend to drive his vehicle into Pierce's home, but that the icy condition of the driveway was to blame for losing control of his vehicle and hitting Pierce's home. Even though defendant's intent comprised a disputed factual element, a rational view of the evidence did not support an instruction for the lesser-included offense. Defendant conveniently ignores testimony by Pierce and his children that defendant was forcefully trying to beat down the door while verbally threatening Pierce. In addition, defendant ignores testimony by the police that the tracks and force of the impact were not consistent with sliding on an icy driveway. A rational view of the evidence supports only the conclusion that defendant had the intent to commit an assault. Therefore, defendant was not entitled to the instruction, and counsel was not ineffective for failing to request it.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher

EXHIBIT G

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LEE THOMPSON,

Defendant-Appellant.

UNPUBLISHED
August 25, 2009

No. 284160
Genesee Circuit Court
LC No. 07-020463-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment without parole. He appeals as of right. We affirm.

Defendant's conviction arises from the October 7, 1996, drowning death of William Beauchamp in Genesee County. Julie Vega, a bartender at the Viking Lounge bar, testified that defendant and codefendant Randy Snyder encountered Beauchamp, a homeless man, at the bar on the evening of October 6, 1996. According to Vega, defendant remarked that he wanted to harm Beauchamp for something he had done to defendant's grandmother. Beauchamp thereafter left the bar with defendant and Snyder, despite Vega's warning not to go with them.

Beauchamp's body was discovered in the Flint River near a fishing site the following morning. A forensic examination indicated that he had been struck in the head with a blunt object, dragged to the river, and immersed in the water while still alive. The examiner determined that the cause of Beauchamp's death was drowning. After seeing a news report of Beauchamp's death, Vega contacted the police and gave them defendant's name. She also identified defendant's photograph from a photographic array. Lieutenant Shanlian interviewed defendant, who admitted meeting Beauchamp at the bar, but claimed that he left the bar with his wife. Defendant's wife corroborated defendant's alibi.

The investigation stalled until Lieutenant Shanlian learned in 2006 that Snyder had made statements implicating himself and defendant in Beauchamp's death. After interviewing Snyder, Shanlian obtained a warrant for defendant's arrest and drove to Tennessee where defendant was then living. After defendant was arrested, he agreed to waive extradition and return to Michigan. Shanlian interviewed defendant after his arrest. Defendant admitted leaving the bar with Snyder and Beauchamp and going to the fishing site, but stated that he was too intoxicated to fully

understand what was happening. He claimed that he and Beauchamp got into a fight, during which Beauchamp jumped on him and immobilized him, and then Snyder hit Beauchamp with a tire iron to get him off defendant. According to defendant, he and Snyder then drove away, leaving Beauchamp behind. Defendant subsequently recalled that he and Beauchamp fought in the water, but did not admit to drowning him.

Before trial, defendant moved to suppress his confession on the ground that it was not voluntarily given. Defendant argued in part that his confession was induced by Shanlian's threats that his wife could be arrested for obstruction of justice and that his children could be placed in foster care. The trial court held a *Walker*[1] hearing at which Shanlian denied threatening to arrest defendant's wife or to remove defendant's children. Shanlian testified that defendant raised these issues when Shanlian asked him whether he had asked his wife to lie for him in the 1996 interview. Shanlian claimed that he repeatedly told defendant that he did not intend to arrest his wife, although he acknowledged telling defendant that the prosecutor had the authority to initiate criminal charges against her. The trial court ultimately determined that, under the totality of the circumstances, defendant's confession was not involuntary.

I. Voluntariness of Defendant's Confession

Defendant first argues that the trial court erred in denying his motion to suppress his confession. Defendant contends that his confession was not voluntarily given because it was induced by Shanlian's threats that, if defendant did not cooperate and tell the truth, his wife could be arrested and prosecuted for obstruction of justice and his children placed in foster care.

A defendant's statement obtained during a custodial interrogation is admissible only if the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). When assessing a defendant's claim that a challenged statement was involuntary, an appellate court reviews the record de novo and makes an independent determination of voluntariness. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996). However, deference is given to the trial court's assessment of the evidence and the credibility of the witnesses. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). The trial court's findings of fact are reviewed for clear error. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of a confession indicates that it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). A non-exhaustive list of factors to consider in determining voluntariness include:

> [t]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured,

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

> intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

Threats and promises of leniency are also factors to consider. *People v Sexton*, 458 Mich 43, 66; 580 NW2d 404 (1998). In *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984), a majority of our Supreme Court concluded that whether a promise of leniency may render a defendant's statement involuntary is also to be evaluated under the totality of the circumstances. *Id.* at 761-762. In this case, defendant and Shanlian presented conflicting testimony concerning the circumstances surrounding defendant's custodial interview. An evaluation of defendant's confession under the totality of the circumstances ultimately depends on which witness was more credible.

According to defendant, Shanlian made comments to the effect that he would contact the prosecutor about bringing charges against defendant's wife for obstruction of justice if defendant did not provide a statement. Defendant claimed that Shanlian also advised him that if defendant's wife were arrested, their children would be placed in foster care. Defendant also claimed that he was cold and uncomfortable in the interrogation room, and was not given an opportunity to take his pain medication.

Conversely, Shanlian testified that he affirmatively advised defendant that he did not intend to arrest defendant's wife, although he acknowledged advising defendant that the prosecutor could independently decide to charge her with obstruction of justice. A transcript of recorded portions of defendant's interview corroborates this account. Shanlian's acknowledgment that any decision to charge defendant's wife rested with the prosecutor, and not with him, negates an inference that Shanlian was attempting to induce a confession by offering leniency for defendant's wife as a quid-pro-quo for defendant's confession, or by threatening to bring criminal charges against defendant's wife as a consequence of defendant's refusal to cooperate and give a statement. Shanlian also testified that defendant was regularly offered food, water, and bathroom breaks. Moreover, according to Shanlian, it was defendant who first raised the issue of possible criminal charges against defendant's wife. Shanlian testified that he responded to defendant's question by positively stating that he had no intention of arresting defendant's wife, but acknowledging that he could not speak for the prosecutor, who had the authority to independently initiate charges for obstruction of justice. This account, if true, indicates that Shanlian did not seize upon defendant's concern for his wife's jeopardy as a means of extracting a confession from him.

It was the trial court's prerogative to assess the credibility of the witnesses. See *Shipley*, *supra* at 372-373. Considering the totality of the circumstances in accordance with Shanlian's version of events, which the trial court apparently found more credible, we conclude that defendant's confession was not involuntarily given. The trial court did not err in denying defendant's motion to suppress his confession.

II. Identification Testimony

Defendant argues that the trial court erred in denying his motion to suppress Vega's identification testimony. Defendant contends that Vega's identification of him resulted from an impermissibly suggestive photographic array.

A trial court's decision to admit identification evidence generally will not be reversed unless it is clearly erroneous, *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993); *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). A photographic identification procedure violates a defendant's right to due process when it is so impermissibly suggestive under the totality of the circumstances that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *Kurylczyk*, *supra* at 302.

Defendant contends that the photographic array is impermissibly suggestive because his appearance is markedly distinctive from that of the other men in the filler photographs, because he is the only man who is fully bald, the only man with a prominent goatee, and he appears to be the oldest. Differences among participants in a lineup are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other participants in the lineup. *Id.* at 312. "Physical differences generally relate only to the weight of an identification and not to its admissibility." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). After reviewing the photographic array, we agree with the trial court that the physical differences between the participants do not substantially distinguish defendant from the other participants. Although defendant is partially bald, the other participants have high hairlines and short hair, and one participant appears to have a shaven, if not bald, head. Defendant's goatee is not particularly prominent, and two other subjects (one and six) also appear to have thin facial hair on their chins. Contrary to what defendant asserts, he does not appear noticeably older than the other participants. Although subject three appears to be younger, the remaining subjects, including defendant, appear to be relatively close in age. The trial court did not clearly err in finding that the photographic array is not impermissibly suggestive.

III. Juror Oath

Next, defendant argues that a new trial is required because the trial court failed to administer an oath to prospective jurors before the beginning of the jury selection process, contrary to MCR 6.412(B). Defendant did not object to the trial court's failure to administer the oath. Thus, this issue is not preserved.

We disagree with defendant's argument that the failure to administer the oath required by MCR 6.412(B) is structural error requiring automatic reversal without a showing of prejudice. *People v Anderson (After Remand)*, 446 Mich 392, 404-405; 521 NW2d 538 (1994). "A structural error is a "fundamental *constitutional* error[] that 'def[ies] analysis by "harmless error" standards.'" *People v Miller*, 482 Mich 540, 556; 759 NW2d 850 (2008), quoting *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (emphasis in the original). The pre-selection oath prescribed by MCR 6.412(B) is not constitutionally required. Our jurisdictions have similarly found that errors relating to the administration of juror oaths are not structural errors. See *State v Godfrey*, 136 Ariz 471; 666 P2d 1080 (1983), *State v Saybolt*, 461 NW2d 729 (Minn App, 1990), *State v Block*, 170 Wis2d 676; 489 NW2d 715 (Wis App, 1992),

and *State v Vogh*, 179 Or App 585; 41 P3d 421 (2002). See, also, *Miller*, *supra* at 547, 556 (recognizing that although a criminal defendant has a constitutional right to be tried by an impartial jury, a criminal defendant does not have a constitutional right to be tried by a jury free of convicted felons and, therefore, the presence of a convicted felon on the defendant's jury, contrary to statute, did not constitute structural error). Accordingly, because failure to administer the pre-selection oath required by MCR 6.412(B) is not structural error, to avoid forfeiture of this unpreserved issue, defendant must demonstrate plain error affecting his substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Although there is no indication in the record that the trial court administered the pre-selection oath required by MCR 6.412(B), the record reflects that the court did administer an oath after the jury was selected that substantially comported with MCL 768.14. Further, defendant has not demonstrated that any of the jurors either were not impartial, or were untruthful or concealed information during voir dire. Therefore, defendant has not demonstrated that his substantial rights were affected.

Defendant also argues that trial counsel was ineffective for failing to object to the trial court's failure to administer the oath required by MCR 6.412(B). Even assuming that counsel's failure to object was objectively unreasonable, defendant has not demonstrated the requisite prejudice necessary to establish a claim of ineffective assistance of counsel. See *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

IV. Defendant's Standard 4 Brief

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which have merit.

First, defendant argues that the prosecutor committed misconduct during closing argument when she stated that (1) Beauchamp was "very likely rendered unconscious," (2) Beauchamp "did not arrive at the Irish Road site conscious," (3) defendant dragged Beauchamp out of the truck, and (4) Beauchamp was beat in the truck before being taken to the Irish Road site. Defendant claims that these purported facts were not supported by the evidence. We disagree. Because defendant failed to preserve this issue for appeal with a timely and specific objection in the trial court, our review is for plain error affecting substantial rights. See *Carines*, *supra* at 752-753; *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). But a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). The prosecutor is, however, free to argue the evidence and any reasonable inferences that may arise from the evidence. *Id.*

Here, Dr. Qazi Azher, the forensic pathologist who performed the autopsy on Beauchamp, testified about his several injuries, including facial bruising and lacerations, bilateral eye hemorrhages, broken nasal bones, broken teeth, subcutaneous hemorrhage beneath the scalp, as well as bruising and abrasions on both sides of his body. In particular, with regard to the

abrasions on the right side of Beauchamp's chest and abdomen, Dr. Azher testified: "basically these are like drag marks." When specifically asked about these abrasion injuries, Dr. Azher repeatedly testified that they were consistent with Beauchamp being dragged. Dr. Azher also testified that the head injuries were consistent with blunt trauma to the head. He further opined that Beauchamp was alive when he entered the water, but indicated that Beauchamp could have been unconscious. In light of this trial testimony, as well as the reasonable inferences that arise from the evidence, this claim of prosecutorial misconduct lacks merit. See *Ackerman*, *supra*. Thus, defendant's claim of ineffective assistance of counsel premised on this argument is also without merit.

Finally, defendant argues that the trial court improperly vouched for a prosecution witness when it referred to the witness as "our friend." After review of this unpreserved claim for plain error affecting substantial rights, we disagree. See *Carines*, *supra*; *Barber*, *supra*.

A trial court has a duty to assure that all parties receive a fair trial. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). One morning, just before the trial was to continue, the trial court stated: "Members of the jury, good morning, all. I'll swear in our friend Lieutenant Shanlian here so [defense counsel] can continue the cross." Considered in context, we conclude that the trial court's statement was merely a colloquial use of the phrase "our friend" that would not lead reasonable jurors to believe that the trial court was vouching for the credibility of this witness. Accordingly, this argument is without merit. And defendant's claim of ineffective assistance of counsel premised on this argument is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis